

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Lead Case No. 08-99000-smb

4 Case No. 08-01789-smb

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6 In the Matter of:

7 SECURITIES INVESTOR PROTECTION CORPORATION,

8 Plaintiff,

9 v.

10 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC, et al.,

11 Defendants.

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14 United States Bankruptcy Court

15 One Bowling Green

16 New York, NY 10004

17

18 July 25, 2018

19 10:10 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 HEARING re Conference re Motion for an Order Establishing  
2 Omnibus Proceeding for the Purpose of Determining the  
3 Existence, Duration and Scope of the Ponzi Scheme at BLMIS  
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25 Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Go ahead.

MS. BELL: Good morning, Your Honor. Stacey Bell, counsel for the Trustees, BakerHostetler. Your Honor, we're here on a status conference on the Trustee's motion for an order establishing an omnibus proceeding on the existence, duration, and scope of the Ponzi scheme at BLMIS. Since the last time we were here, we've refiled that motion, and so now we're here on an omnibus Ponzi pretrial proceeding.

If this Court will recall, the Trustee filed a motion in February seeking to consolidate the remaining good faith actions on the issue -- on the Ponzi issue. And in response to the Trustee's motion, the Trustee received a number of objections. 106 cases filed objections. There were eight law firms. We've since -- that number has since dropped to seven law firms with 105 cases at issue.

So, a month ago, the parties appeared before Your Honor to update the Court on the status of the negotiations. And at that time, the Trustee reported that since receiving the Defendant's objections, the parties had been engaged in negotiations seeking to streamline the issues for the Court. More specifically, the parties were engaged in discussions about a consolidated proceeding that would address discovery only, tabling issues of trial and dispositive motions for a later date.

1           Based on the progress that the parties had made  
2           during the course of their negotiations, as of the last  
3           hearing, the Trustee expressed optimism that we would be  
4           able to enter into a revised consensual order. And the  
5           objecting parties agreed with the Trustees -- the Trustee  
6           and acknowledge the progress that the parties had made to  
7           date.

8           Subsequent to the hearing, Your Honor, the Trustee  
9           sent a revised proposed order to the Defendants. That is  
10          the order that is now before the Court. And the revised  
11          order, as I stated before, we refiled a pretrial order  
12          because we significantly limited -- and it indicated the  
13          substantial overhaul and changes between the initial order  
14          and the revised order.

15          The Trustee's counsel had a meeting with  
16          Defendants with the objecting Defendants, where it was our  
17          hope that we would continue in the same vain as the initial  
18          rounds of discussions, making progress towards a consensual  
19          order.

20          At the meeting, as reflected in our reply papers,  
21          the objecting Defendants informed the Trustee that they  
22          could not agree to the order because as a threshold matter,  
23          discovery was closed in a majority of their cases and the  
24          fact, of course -- discovery renders this proceeding  
25          problematic.



1 In the Defendant's view, the only cases that could  
2 proceed on this consolidated basis would be cases where fact  
3 discovery is open under the CMO. The Trustee obviously --

4 THE COURT: How many of those?

5 MS. BELL: There are about seven or so cases, Your  
6 Honor, and I'll go through those categories in just a  
7 moment. But there are seven cases in the Trustee's view  
8 that are open with -- under the existing CMOs. The Trustee  
9 disagrees with Defendant's position, and we decided to file  
10 a motion or a reply just in accordance with the Court's  
11 directive at the last hearing, that that reply be put in by  
12 July 18th.

13 The day before the filing, the Trustees received -  
14 - the Trustee received comments to our proposed order, and  
15 those comments highlighted and confirmed how far apart the  
16 parties were. In the Trustee's view, we've accommodated and  
17 we've sought to accommodate the Defendant's position vis-à-  
18 vis our proposed revised order on what a restructured  
19 omnibus Ponzi proceeding could look like. And we think that  
20 the revised order is judicially efficient and it streamlines  
21 the discovery process going forward on the Ponzi issue.

22 And so, Your Honor, I want to talk just a bit  
23 about how the Trustee's grouped the cases because, in our  
24 view, there are three groups of cases. The first group --  
25 and that's the question Your Honor just had -- the cases

1 where fact discovery is open under existing CMOs. The  
2 second group, in the Trustee's view, would be the cases that  
3 participated in Madoff's deposition. And then the third  
4 group of cases are cases where discovery is closed and they  
5 did not participate in Madoff's deposition. And I'll take  
6 those (indiscernible).

7 Cases with open fact discovery -- I don't think  
8 that there would -- I don't expect there to be disagreement,  
9 and I think we've gotten that far with the negotiations  
10 where Defendants would agree that those would be part of a  
11 consolidated proceeding. There are seven of those cases.

12 With respect to the cases that participated in  
13 Madoff's deposition, of the objecting parties there are 92  
14 of those cases that participated in Madoff's deposition.  
15 And given the deposition, in the Trustee's view, it's  
16 reasonable at this juncture to seek to take additional  
17 discovery on the Ponzi issue to refute the issues injected  
18 into the case by Mr. Madoff's deposition.

19 And, Your Honor, just -- if you would indulge me a  
20 bit, just to go through how Madoff's deposition --

21 THE COURT: What discovery does the Trustee need?  
22 The Trustee's been preparing these cases for ten years or  
23 eight years.

24 MS. BELL: Yes, Your Honor, and that is absolutely  
25 correct. And I think as we addressed at the last hearing,

1 Mr. Madoff injected certain issues into the case that the  
2 Defendants themselves have agreed that these are completely  
3 new issues, and we have transcripts where we've talked about  
4 that. And so, the Trustee would like the opportunity to put  
5 in additional fact witnesses who can testify --

6 THE COURT: But who? What? Who do you --

7 MS. BELL: So, there are certain witnesses that  
8 Mr. Madoff himself mentioned at the deposition, so we can  
9 start with those individuals like Mr. Dan Bonventre,  
10 individuals like Ms. Annette Bongiorno, Ms. Condoleezza  
11 Picks. There are a number of individuals who either worked  
12 on the convertible arb transactions that are clearly at  
13 issue, just based -- coming out of Mr. Madoff's deposition.  
14 The Treasury transactions that the Defendants, I think, have  
15 now wrapped a lot of their defenses around.

16 THE COURT: But let me ask you this. It's always  
17 been the Trustee's theory that the Ponzi scheme began in the  
18 '70s, I think.

19 MS. BELL: Yes, Your Honor.

20 THE COURT: Okay. So I assume you would have been  
21 able to prove that when -- or develop that case over the  
22 last eight years because Madoff allocuted that it began in  
23 1992 or something like that, right?

24 MS. BELL: Yes.

25 THE COURT: So, why do you need more discovery?

1 MS. BELL: Yes. He allocuted that the Ponzi began  
2 in the 1990s but Mr. Madoff's testimony has changed over  
3 time. Your Honor, and to be clear, the Trustee --

4 THE COURT: But he's never deviated from that, I  
5 don't think.

6 MS. BELL: Well, I think he's deviated in a number  
7 of significant ways. He said that the Ponzi scheme began in  
8 '92 and then in his deposition, he walked away from that and  
9 said, well, the convertible arb transactions were always  
10 real. And so now it's now longer a time limitation; it's  
11 become a strategy-based limitation.

12 The convertible arb transactions purportedly  
13 occurred through 1998. And so are we at '98 or are we at  
14 '92? There is also -- Mr. Madoff in his allocution said  
15 that the split strike conversion strategy did not happen;  
16 that he promised customers that he would have a basket of  
17 securities. He did not. And as part of that promise he  
18 also promised that he would invest in treasury, and he  
19 didn't do it. And he said that --

20 THE COURT: It's been awhile since I looked at his  
21 deposition, but as I recall, he was talking about earlier  
22 days in his deposition. And I thought he always said that  
23 once he started the split strike conversion strategy -- or  
24 he never even addressed what happened after 1992.

25 MS. BELL: I think he said in later depositions

1 that the convertible arb strategy was real, and those  
2 transactions went through '98. I think --

3 THE COURT: So, who would you want to depose about  
4 that?

5 MS. BELL: With respect to convertible arb, I  
6 think there are a number of former BLMIS employees. Ms. Jo  
7 Ann Sala, who worked with Mr. David Kugel on the convertible  
8 arb transactions. So, Mr. Kugel as well, who also pled.  
9 And these are individuals who testified at the criminal  
10 trial.

11 What the trustee is seeking to do is to have a  
12 limited number of former BLMIS employees who can testify to  
13 the issues that admittedly the Defendants have said that  
14 these are new issues and these things completely change the  
15 case.

16 THE COURT: Do you know what they're going to say?

17 MS. BELL: I'm sorry?

18 THE COURT: Do you know what they're going to say,  
19 these witnesses?

20 MS. BELL: Your Honor, we have a good sense of  
21 what they're going to say just based on --

22 THE COURT: So, why don't you just call them as  
23 witnesses at the trial?

24 MS. BELL: Your Honor, we are preparing to do  
25 that. I think, though, that the Trustee -- the record is

1 going forward, at least the evidence that's been produced to  
2 date, is going forward with full -- four days of Madoff's  
3 deposition. And similar to the decision that was made in  
4 the PW context, where the Trustee was given the opportunity  
5 because Defendants sought Mr. Madoff's deposition to speak  
6 with former employees. And Your Honor raised "Well, have  
7 you spoken to anyone else?" I think the Trustee should be  
8 accorded -- though it might be a limited number of folks --  
9 the opportunity to speak to those employees. To go forward  
10 on a full record and a full consistent, balanced record so  
11 that Mr. Madoff's testimony is not the only fact witness  
12 that we have at play on this Ponzi issue that runs across  
13 all the cases.

14 And, Your Honor, I think Mr. Madoff's deposition  
15 has changed -- has injected a number of new issues, like I  
16 said before, into the case. And this proceeding, this fraud  
17 proceeding, I think as we've termed it, if you recall, when  
18 Mr. Madoff's deposition was requested, it was really around  
19 the '92 issue. We started calling it the start date issue.

20 There was an expert report, Mr. Feingold, that  
21 some of the Defendants proffered on this '92 issue on  
22 convertible arb. That issue has since changed. Those  
23 issues have evolved. We're now talking about there was no  
24 Ponzi at all, or the treasury transactions were made for the  
25 investment advisory business customers. Or everything that

1 happened outside of con-arb or split strike, those accounts  
2 that we call in our papers the non-con-arb, non-split-strike  
3 transactions, those were always real.

4 I think that because those issues are injected  
5 into these cases that the Trustee should be given a limited  
6 opportunity to rebut what Mr. Madoff has said, because  
7 Defendants themselves -- and we have a number of transcripts  
8 where we've all agreed that these are new issues that we  
9 would -- when we got to the point of Mr. Madoff's deposition  
10 being concluded, that we would address those issues there.  
11 And the Trustee's simply asking for the opportunity, to be  
12 accorded the opportunity to do that.

13 We're not looking for a discovery period that will  
14 go for years and years. I think, though, that --

15 THE COURT: Well, it does go for a year.

16 MS. BELL: It does, Your Honor. But I think under  
17 any other formulation it will go for at least -- longer than  
18 that because we'll be proceeding on separate tracks. You  
19 have cases where discovery is still open. The Trustee will  
20 have that evidence in those cases on the same Ponzi scheme  
21 perpetuated by the same person at the same company. And so  
22 to proceed on different factual record I think raises a  
23 significant issue for the parties and certainly for the  
24 Trustee.

25 And our attempt to come up with an omnibus

1 proceeding that would be fair, I think the Court can see the  
2 significant substantial differences between the original  
3 order and the revised order. And we didn't put in a red  
4 line because there was no point in doing that because the  
5 order has changed so significantly. Simply to deal with the  
6 Ponzi issue in Mr. Madoff's deposition and the Trustee's  
7 ability to -- and just based on the course of dealing, I  
8 think, and the hearings before this Court, it was always  
9 anticipated that the Trustee would have an opportunity to  
10 rebut the testimony.

11 And if we review the day one order on Paragraph L  
12 -- Paragraph L was very clear in that order that as to the  
13 participating customers, they would not have the opportunity  
14 to continue deposition because Your Honor recognized that  
15 they requested this deposition years after these cases had  
16 been proceeding. And so the Trustee expressly in hearings  
17 carved out his right to be able to go after additional  
18 discovery to rebut Mr. Madoff's deposition testimony.

19 I think that also came through in the day two  
20 order. And in that order, that order expressly incorporates  
21 what happened at the hearing on June 29. And at that  
22 hearing, again, there was a colloquy about the Trustee's  
23 ability to be able to take additional discovery.

24 THE COURT: One of the problems I have is your  
25 order is sort of open-ended. Both Madoff orders, deposition



1 orders said that you had the right to seek further discovery  
2 based upon Madoff's testimony. You've now told me well,  
3 there's the issue of whether or not the convertible  
4 arbitrage transactions were legitimate transactions; there's  
5 the issue of whether -- when the business was purchasing  
6 treasuries, they were or should have been allocated to the  
7 particular customer accounts. Those are two issues. What  
8 other issues do you want to take discovery on? I'm trying  
9 to understand and confine what it is you're looking into.

10 MS. BELL: Well, so I think, Your Honor, there's  
11 the issue of Madoff's deposition, but what's derivative of  
12 that, what defense is --

13 THE COURT: Madoff's deposition is done, as I  
14 understand it.

15 MS. BELL: Your Honor, I think that's something  
16 that we will decide today. I know in the Trustee's view,  
17 we're prepared -- we're fine with Mr. Madoff's deposition  
18 being concluded. I know --

19 THE COURT: Well, did everybody have the right to  
20 cross-examine?

21 MS. BELL: Well, at the end of the last deposition  
22 I know Ms. Chaitman reserved her right to take additional  
23 time. In the Trustee's view, the deposition has concluded.

24 THE COURT: How many days was Madoff deposed?

25 MS. BELL: He was deposed, I believe, on day one

1 he was deposed for three days. And day two he was deposed  
2 for two days.

3 THE COURT: Okay.

4 MS. BELL: But, Your Honor, the arguments have  
5 advanced beyond the convertible arb and beyond the start  
6 date of the Ponzi scheme. So --

7 THE COURT: But that's what I'm -- that's what I'm  
8 trying to find out, because all your order says is we've got  
9 four months of fact discovery and it's not supposed to be a  
10 complete do-over.

11 MS. BELL: Right, and I agree with that, Your  
12 Honor. So, what the Trustee was attempting to do in this  
13 order was, in our meet and confer, the Defendants raised the  
14 issue of the 27 subpoenas that Ms. Chaitman served. If you  
15 recall in the original order, the Trustee had a limited  
16 number of discovery. We tried to do it based on numbers so  
17 the Court would see from the Trustee's perspective we're not  
18 trying to have this go for many, many months and to be an  
19 open-ended process.

20 In this order we did not do that simply to  
21 accommodate the request to have those 27 trader subpoenas.  
22 And I think that's worth talking about as well, because not  
23 only do we have Madoff's deposition that the Defendants have  
24 requested but there are 27 trader subpoenas of former BLMIS  
25 employees who worked on the House 5 side. I think there was

1 one who was on the House 17 side, but we want the  
2 opportunity to talk to the House 17 employees. There is a  
3 criminal trial. In 2014, five employees were found guilty.  
4 There are a number of plea allocutions where we would like  
5 the opportunity to have -- and we recognize that that's  
6 admissible evidence, but to explore those and to unpack  
7 those to address the issues that are at play in this case.

8 And so Defendants have not only stated the start  
9 date issue and the convertible arb issue, but there's an  
10 issue about how subscription -- how redemption requests were  
11 paid. There was no Ponzi scheme at all. The issues have  
12 ballooned and mushroomed from beyond where we started. And  
13 so if the Trustee was preparing a case -- and we certainly  
14 believe, again, that we have enough admissible evidence to  
15 prove our case, but as a matter of fairness and equitable  
16 principles, this case should go forward on a full and  
17 balanced record.

18 THE COURT: But a lot of the Defendants say we  
19 don't -- you know, discovery's cut off.

20 MS. BELL: But --

21 THE COURT: You should be able to prove your case.  
22 If they don't want discovery, why do you want to keep  
23 discovery open?

24 MS. BELL: Because, Your Honor, we kept it open on  
25 the Ponzi issue, I think, from -- that was always

1 contemplated in connection with Mr. Madoff's deposition.

2 The other fact I would say is, again, if discovery  
3 happens in some of the cases and not in the other cases,  
4 this becomes an incomplete record for some cases and on the  
5 same Ponzi scheme. So I think there is an issue there that  
6 the Court would need to address.

7 And if we go forward, and the Trustee is prepared  
8 to go forward on these cases one at a time -- but we've  
9 tried that before in the Cohen case, if the Court will  
10 recall, and there was a motion to intervene. And so, again,  
11 we're not trying to get --

12 THE COURT: That was unsuccessful and affirmed on  
13 appeal so --

14 MS. BELL: Correct, correct. We're not trying to  
15 get an advantage here. It's the Trustee's -- we're not  
16 trying to do a one-upmanship here. I think the idea is to  
17 proceed in a way that is rational, that is judicially  
18 efficient. It's an opportunity for the Court and for the  
19 parties to streamline this process, because otherwise, we  
20 continue with these discovery disputes for certain types of  
21 records. There -- we've integrated and built into the  
22 process where we would have Judge Moss overseeing some of --  
23 to the extent that discovery disputes come up, to take that  
24 off the Court's calendar, and because Judge Moss is familiar  
25 with these issues that have come up before.

1 THE COURT: Well, the Defendants would have to  
2 consent to that but --

3 MS. BELL: Yes, Your Honor, I agree with that.

4 THE COURT: All right. All right. Let me hear  
5 from the Defendants.

6 MS. CHAITMAN: Good morning, Your Honor. Helen  
7 Davis Chaitman on behalf of a number of Defendants. Your  
8 Honor, when I answered the complaints on behalf of all of my  
9 clients, I asserted that we did not believe that there was a  
10 Ponzi scheme and that we believed that Madoff purchased the  
11 securities.

12 So these issues have been in this case from day  
13 one. And the reason that I have embarked on this now two-  
14 year effort to obtain the trading records is because I  
15 believe I can prove -- I've already gotten some records  
16 which I've been able to prove that the securities were  
17 actually purchased for some of my customers.

18 Now, there's -- the Court has been so strict in  
19 enforcing the case management orders and the deadlines in  
20 the case management orders, and most of that has worked  
21 against the Defendants. Because we've come in and asked for  
22 additional time and Your Honor has been very strict about  
23 it, which, of course, is -- I'm not challenging your right  
24 to do that. Of course you have the right to do that. But  
25 that should be applied to the Trustee as well.

1           These issues have been in the case from day one,  
2           and the Trustee -- I mean, for the Trustee to say that they  
3           didn't know we were going to take the position that actual  
4           securities were purchased is absurd. I believe it was in  
5           2011 that I filed evidence of Madoff having purchased T-  
6           bills. And the Trustee filed papers saying I didn't know  
7           what I was talking about; this was a phony document. And  
8           then Mr. Madoff said, yes, the 17th floor customers did, in  
9           fact, have T-bills and he used their money to purchase a  
10          portfolio of \$6 billion of T-bills, and you've heard about  
11          that in the past. So these are not new issues and there's  
12          no reason to take this discovery now.

13           THE COURT: So, why do you want to take the  
14          discovery of the traders with your subpoenas?

15           MS. CHAITMAN: Because I served those subpoenas  
16          about 18 months ago and Your Honor took the position that I  
17          couldn't take those depositions.

18           THE COURT: Well, we said we would wait -- there's  
19          an order that says we'll wait until the end of the Madoff  
20          deposition.

21           MS. CHAITMAN: Right, okay. So what's happened  
22          with the Madoff deposition is that, as you are painfully  
23          aware, I've been trying to get the Trustee to produce the  
24          trading records. We've been going round and round on this.  
25          But on June 5th we all met with counsel for the Trustee and

1 Mr. Sheehan told us that he would give us access to the  
2 BLMIS database, which has, you know -- I forgot the number -  
3 - 30 million pages of documents, whatever it is. That would  
4 include all the trading records.

5 In the meantime, I was before you on May 1st, when  
6 I was asking for permission to file a motion for sanctions  
7 against the Trustee for concealing material evidence, and  
8 you said, go back to Magistrate Judge Moss.

9 THE COURT: That's not what I said. You said I  
10 told you -- in the most recent submission you said I told  
11 you you couldn't make the motion.

12 MS. CHAITMAN: Right.

13 THE COURT: And what I said was I won't stop you  
14 from making the motion, but it sounds to me like Judge Moss  
15 has dealt with these issues, he's established a procedure,  
16 and that procedure should be followed. And you said, okay,  
17 I'll go back to Judge Moss.

18 MS. CHAITMAN: Okay.

19 THE COURT: Did you go back?

20 MS. CHAITMAN: Here's what happened. That very  
21 afternoon, May 1st --

22 THE COURT: I take it from your response, you  
23 didn't.

24 MS. CHAITMAN: Let me tell you why. May 1st, the  
25 day we were before you, Mr. Shifrin emailed me and said we

1 will voluntarily producing the trading records.

2 THE COURT: You were before me that day, May 1st.

3 MS. CHAITMAN: I'm sorry?

4 THE COURT: The transcript is May 2nd but you were  
5 before me May 1st.

6 MS. CHAITMAN: Okay. On May 1st, the day that we  
7 were here, I got an email from Mr. Shiffrin which I put into  
8 evidence. I sent it -- I filed it on Monday. Where Mr.  
9 Shiffrin emailed me and said, we will produce the trading  
10 records. We then had communications where he produced  
11 trading records he'd previously produced --

12 THE COURT: Can I save some time and cut you off  
13 on this? I've been hearing about this now for over two  
14 years. There is a procedure in place. You can either go  
15 back to Judge Moss, I suppose, where I said, go make a  
16 Motion to Compel, if you want to make a motion. But this  
17 has been a he said-she said for two years and they're going  
18 to tell me that they did produce whatever it was you had  
19 asked for.

20 So, with respect to these trading records, just  
21 make a motion or go back to Judge Moss with the procedural -  
22 -

23 MS. CHAITMAN: Then I'll make a motion.

24 THE COURT: Fine.

25 MS. CHAITMAN: I'll make a motion. But let me go



1 over a few of the issues. You know, there --

2 THE COURT: Let's get back to the procedure.

3 MS. CHAITMAN: Okay. There are two separate  
4 issues here, though. One is the discovery, which you have  
5 always expressly on the record reserved, which was the open  
6 discovery. I was able -- you said I could take the  
7 depositions and get the documents from the subpoenaed --

8 THE COURT: Well, I said you could serve the  
9 subpoenas and then we would talk about that and I think  
10 expert discovery after the end of Madoff's deposition.

11 MS. CHAITMAN: There was the issue of my document  
12 demand, which has never been satisfied, and there was the  
13 issue of the discovery of the traders, and there was the  
14 completion of Madoff's deposition, which I've left open  
15 solely because the Trustee has not produced the trading  
16 records.

17 If Mr. Sheehan fulfills his promise to us on June  
18 5th that he will give us all access to the BLMIS database,  
19 that would solve the trading records issue. He hasn't told  
20 me he's reneging on that --

21 THE COURT: These are the 4,000 microfilms?

22 MS. CHAITMAN: No, no, no. This has nothing --

23 MS. BELL: No, Your Honor, these are 30 million  
24 documents.

25 MS. CHAITMAN: 30 million --

1 MS. BELL: For the BLMIS database.

2 THE COURT: And what's involved in making them  
3 available mechanically?

4 MS. BELL: Your Honor, I think we have to proceed  
5 pursuant to Rule 26 of the Federal Rules of Civil Procedure,  
6 and there are some technical issues.

7 THE COURT: What's involved in producing those?

8 MS. BELL: So, here's what I'd say, Your Honor.  
9 We had -- in the first meet and confer that we had, where we  
10 thought we were making progress, one of the things, because  
11 we had I thought, tentatively at least -- I conceptually  
12 agreed to a consolidated discovery proceeding.

13 In the context of that discussion, the BLMIS  
14 database came up and Mr. Sheehan did represent that the  
15 Trustee is certainly open to producing that database. There  
16 are some logistical issues that we will need to talk about  
17 with Defendants. There are cost concerns, there are  
18 concerns. And so we had set aside another meeting --

19 THE COURT: Well, that's what I want to know. I  
20 want to know who's going to bear the cost of this.

21 MS. BELL: And that's what -- we had a meet and  
22 confer that was set up as of the date of the last hearing  
23 that -- that meet and confer did not happen because we had  
24 to come here. We set up another meet and confer and we did  
25 not continue that discussion because at that time,

1 Defendants told us that they were not agreeing to a  
2 consolidated discovery proceeding.

3 THE COURT: Okay. Let's get back to the issues  
4 and the order -- this consolidated discovery issue.

5 MS. CHAITMAN: The -- you mean --

6 THE COURT: I understand you have disputes about  
7 whether documents have been promised or produced, but let's  
8 get back to the order. The concept of consolidate --  
9 additional.

10 MS. CHAITMAN: Okay.

11 THE COURT: Reopen -- whatever consolidated  
12 discovery along the lines the Trustee is proposing.

13 MS. CHAITMAN: Okay. The vast -- as the Trustee  
14 says, the Trustee has not given us the names of the seven  
15 cases that discovery is still open in, but in the vast  
16 majority of my cases, fact discovery has long since closed  
17 except for the deficiencies in the Trustee's production, and  
18 the deposition of Mr. Madoff, and the subpoenaed witnesses.  
19 So, there is no ability to take back discovery.

20 Under the federal rules, the only way that the  
21 case management order could be so retroactively changed is  
22 if the Trustee could prove that he proceeded with all due  
23 diligence, which he can't possibly do, in view of the fact,  
24 as I've explained, that I asserted these issues from day one  
25 in answering the complaints, and the Trustee -- there's

1 nothing that Mr. Madoff said that couldn't have been  
2 anticipated. These are all the --

3 THE COURT: So you're telling me that based upon  
4 what Madoff said, there's no need for additional discovery?

5 MS. CHAITMAN: I'm entitled to --

6 THE COURT: Because the order says -- I'm not --  
7 the order says, or both orders say that I'm not reopening  
8 discovery but I'll consider the issue based upon what comes  
9 out of Madoff's deposition. And you're telling me that  
10 whatever came out of the Madoff deposition has been in the  
11 case for eight or ten years or however --

12 MS. CHAITMAN: Exactly, exactly.

13 THE COURT: All right.

14 MS. CHAITMAN: And it will be proven by the  
15 trading records, if I ever get them.

16 THE COURT: Okay.

17 MS. CHAITMAN: We would like to have the  
18 opportunity, Your Honor, if the Court is going to enter an  
19 order, of submitting a proposed counter-order. There are a  
20 number of issues that are raised by the --

21 THE COURT: Let me raise an issue with you, and  
22 it's really for everybody. At the end of the day, some sort  
23 of consolidated proceeding is contemplated for those cases  
24 that are eligible for that. And by that I mean, cases where  
25 I can make findings of fact and conclusions of law or I can

1 at least make proposed findings of fact and conclusions of  
2 law. I understand the jury trial issue; let's put that  
3 aside.

4 Here's my concern. Discovery is still open in  
5 seven cases, right? The Trustee wants to take Ms.  
6 Bongiorno's deposition in those seven cases, and she  
7 testifies, "Oh, yeah, we never bought a single security. It  
8 was all a fraud." I then have a consolidated proceeding.  
9 Can the parties who were not entitled to further discovery  
10 argue you can't use Ms. Bongiorno's deposition against me  
11 because I didn't have the opportunity to cross-examine?  
12 That's the practical problem I want to deal with.

13 And maybe the answer is, as the Trustee suggests,  
14 well, you can opt in to additional discovery or not but your  
15 order doesn't say it, but you're deemed to have the  
16 opportunity to cross-examine all witnesses that you choose  
17 not to attend.

18 MS. CHAITMAN: Your Honor, with respect to Ms.  
19 Bongiorno's deposition, she's --

20 THE COURT: Let's get back to the practical  
21 problem that I just raised. It could be Ms. Bongiorno's  
22 deposition, it could be anybody. It could be one of your  
23 traders.

24 MS. CHAITMAN: Okay.

25 THE COURT: Suppose one of your traders says, "We

1 never -- we never allocated any purchases from House 5 to  
2 House 7 clients." So, how do I deal with that in a  
3 consolidated proceeding where some people have not been  
4 allowed to participate in discovery because discovery was  
5 closed? That's my practical question to all this.

6 MS. CHAITMAN: Okay. That means that we'd have to  
7 -- you know, these cases from day one have proceeded  
8 separately.

9 THE COURT: I understand.

10 MS. CHAITMAN: And so based on who was the  
11 attorney representing the Defendants and other issues,  
12 different discovery was taken. You've got that issue.  
13 We've got ten years of that history.

14 THE COURT: So are you saying that you really  
15 can't have a consolidated proceeding? Is that what the  
16 answer to all this is?

17 MS. CHAITMAN: I think that it's impossible. My  
18 own view is it's impossible. If the cases had been  
19 consolidated from day one, that was a choice the Trustee  
20 could have made --

21 THE COURT: Well, with the depositions -- I'm not  
22 so worried about documents but with depositions taken in  
23 these separate cases as they were proceeding along just with  
24 those particular Defendants?

25 MS. CHAITMAN: Yes. And particularly with Ms.

1 Bongiorno. I took her deposition in prison with respect to  
2 the profit withdrawal issue --

3 THE COURT: Well, that was a consolidated  
4 proceeding.

5 MS. CHAITMAN: But the point is you ruled that  
6 that deposition cannot be used in the claw-back cases. So -  
7 -

8 THE COURT: Well, I thought you said something  
9 differently -- different. Let me just finish. I thought  
10 you said in any particular case -- and let's take Sarin  
11 Lawrence as an example.

12 MS. CHAITMAN: Okay.

13 THE COURT: You took a deposition of somebody just  
14 in that case. Then what you're saying is the same problem  
15 about trying to use that deposition depending on what they  
16 said in the consolidating proceeding is the same problem  
17 I've just raised. So the problem's already there, is what  
18 you're saying?

19 MS. CHAITMAN: The problem is there. Although in  
20 my cases, I've stated a number of times that if I take a  
21 deposition in Sarin Lawrence' case, it's applying to all of  
22 my clients. And there's never been any objection.

23 THE COURT: Okay. But there are other lawyers  
24 here who will be participate.

25 MS. CHAITMAN: Exactly. Exactly.

1 MR. KRATENSTEIN: If I may, Your Honor. Andrew  
2 Kratenstein for the Sage Defendants. I just wanted to echo  
3 something. I want to pick up on that Bongiorno deposition  
4 point. By the way --

5 THE COURT: I used her as an example.

6 MR. KRATENSTEIN: She is. Well, the reason it's a  
7 good example, actually -- because you're absolutely right,  
8 by the way. What you've come to I agree with completely.  
9 The problem with the concept of a consolidated proceeding  
10 among others is that the cases proceeded on these different  
11 tracks, but why? Why did they proceed -- why are we here,  
12 right?

13 I mean, I, for example, was the person who  
14 actually asked -- it was me who asked to use Bongiorno in my  
15 case, and you said no. Fine. I asked that and in a letter  
16 in November 2016, almost two years ago, the Trustee said in  
17 that letter to this Court, you know, we think we might want  
18 to have an omnibus proceeding like this one later where we  
19 depose Ms. Bongiorno with everybody. And they didn't make  
20 that motion until now.

21 I mean, they've been thinking about -- musing  
22 about doing this for a very long time. They waited until we  
23 were all done to say, "All right, now that I've seen  
24 everything you guys have put in, I'd now like to do some new  
25 things."



1 THE COURT: That's a variation of Ms. Chaitman's  
2 arguments that these issues have been on the table for all  
3 these years.

4 MR. KRATENSTEIN: Absolutely. And the only  
5 addition I'd make on that is when you asked the question of  
6 having all these cases going on different tracks, the  
7 Trustee, who is in each case -- we're not in each case --  
8 had the power very early to realize this issue. Had the  
9 power and, in fact, did realize the issue. They said it to  
10 the Court about two years ago. "You know, we probably are  
11 going to need an omnibus proceeding here. We probably ought  
12 to do that. I don't want, you know, the Sage Defendants to  
13 use Bongiorno's deposition here. We're going to depose her  
14 again," etc.

15 That was the time, Your Honor, to make the motion  
16 that they just recently made. They didn't do it and now  
17 they want, to you use your words, a do-over and they  
18 shouldn't be allowed to do that.

19 MS. BELL: Your Honor, if I may --

20 THE COURT: How do you resolve a practical issue  
21 like -- well, I know what you'll tell me. To reopen a  
22 consolidated discovery proceeding.

23 MS. BELL: But, Your Honor, the Trustee doesn't  
24 see it as a reopening of the proceeding; it's a continuation  
25 of the proceeding. But I just want to address a few things

1 that were just said.

2 THE COURT: Okay, but let me just stop you. There  
3 are a lot of cases where discovery ended, they couldn't  
4 participate in the Madoff deposition, but they're part of  
5 the same issue, right?

6 MS. BELL: But Mr. Kratenstein -- Mr. Kratenstein,  
7 Your Honor, had an objection to the Trustee's original  
8 motion. And I quote from the objection, Paragraph 6, "The  
9 Sages have no objection to coordinating the remaining good  
10 faith actions for discovery purposes." So this is a complete  
11 scene change and an about face.

12 But as equally as important, Your Honor, under the  
13 Court's Madoff order, day one and day two, and with all the  
14 hearings that occurred, the Trustee could not seek such a --  
15 we made it clear that we were contemplating this request.  
16 There was a procedure for doing that. And so --

17 THE COURT: I don't doubt that you were  
18 contemplating the request or you can't make the request, but  
19 the order said if you learn something from Madoff's  
20 deposition that triggered the need for more discovery, that  
21 you could ask for it basically. Or maybe you'll get it.

22 But what the Defendants are saying is nothing came  
23 out of Madoff's deposition that wasn't in the case before.

24 MS. BELL: But, Your Honor, and I can quote from  
25 the transcripts where the Defendants had said, this is

1 completely new, this changes the case.

2 THE COURT: I remember that one. It's true.

3 MS. BELL: And we also have more than one  
4 Defendant's counsel who's said that. Mr. Kajon has also  
5 said that, who represents the Legacy Defendants. Because  
6 this is new. Yes, the Trustee has always anticipated --

7 THE COURT: It's new evidence of something --  
8 contrary to what you were saying, I think that's what it  
9 meant.

10 MS. BELL: But it's also very -- so, the issue of  
11 treasuries being part of the transactions that the  
12 Defendants were claiming either defeated the Ponzi scheme or  
13 rendered their transfers not subject to the Ponzi  
14 presumption, that is a new issue. That issue was not at  
15 play. And as Ms. Chaitman said, she raised the issue in  
16 2011, and every expert report that we've served on each of  
17 these Defendants we have identified in one of the exhibits  
18 that treasuries had been purchased at Madoff Securities.

19 Those treasuries were not for the investment  
20 advisory customers. The yields from those treasuries in any  
21 given year was far less than one percent of any of the  
22 redemptions that went out.

23 And so it's not the Trustee's view that the issue  
24 of treasuries, we didn't know that treasuries existed; we  
25 were always -- we always -- we were open about the

1 treasuries that were purchased by Mr. Madoff. Those  
2 treasuries were not purchased for the investment advisory  
3 customers. The Trustee --

4 THE COURT: So, okay, but you're saying this issue  
5 was always there and, you know, maybe they could've taken  
6 discovery in it whenever it was.

7 MS. BELL: But they've gotten fact deposition --  
8 they've gotten deposition of fact witnesses on that issue.  
9 There are documents -- the Trustee is in possession of  
10 millions, and millions, and millions of documents, as we've  
11 discussed in this court before. The Trustee's discovery  
12 obligation is not simply to produce those documents on some  
13 perhaps theory that the Defendants might come up with to  
14 challenge the Ponzi scheme.

15 And so we are limited by what the issues are in  
16 the case; the claims and defenses in the case. That was  
17 never a defense in the case, as acknowledge in the hearing  
18 by these very same counsel.

19 THE COURT: You know what's remarkable about this?  
20 You sound like you're the Defendants arguing for more  
21 discovery, and the Defendants sound like you're the  
22 Plaintiffs wanting to cut off discovery, which is  
23 remarkable.

24 MS. BELL: This case is very curious, Your Honor.

25 MS. CHAITMAN: Judge, I just want to say one

1 thing. I was the one who made the statement about the  
2 evidence being explosive. The evidence confirmed the  
3 position I asserted in every answer.

4 THE COURT: No, I know what you meant.

5 MS. CHAITMAN: And it's -- you know, this, if I  
6 can use the phrase doubletalk about the treasuries -- they  
7 were purchased with money from the investment advisory  
8 customers. It was money from the 703 account. We can trace  
9 that. So, to say it wasn't purchased for the customers when  
10 --

11 THE COURT: Well, that's the only money he had,  
12 right? The money he got from the customers?

13 MS. CHAITMAN: Not at all. He had 188 employees  
14 working for every major investment firm in the country. It  
15 was all one entity. And as he explained in his deposition,  
16 the back of every trade confirmation he sent to the  
17 investment advisory customers said that he dealt as  
18 principal, which he explained meant that he never went into  
19 the market for the investment advisory customers. They only  
20 bought and sold from Madoff.

21 So it was all one entity. You can't separate out  
22 what the traders did from --

23 THE COURT: We're getting a little far afield --

24 MS. CHAITMAN: Okay.

25 THE COURT: -- which is how do you try this as a -

1 - how do you try it as a consolidated proceeding where  
2 discovery has already been taken, I guess, in some cases?

3 MS. BELL: They have not on the Ponzi issue, Your  
4 Honor, for BLMIS employees.

5 THE COURT: Well, whatever the issue was. Some of  
6 them are trial ready --

7 MS. BELL: Well, just as Defendants. We've not  
8 taken discovery on any of these issues with the exception of  
9 Madoff's deposition in PW, which was different, and that was  
10 on a consolidated proceeding. Essentially, what we're  
11 proposing here is the very thing.

12 And, Your Honor, I neglected to mention I accept  
13 your proposed change of having the deposition that  
14 Defendants deemed to have participated in the deposition,  
15 and we'll submit a proposed order that includes that  
16 provision. Because I think that gets to the crux of what it  
17 is that we're trying to do here, proceeding on -- and in our  
18 review, these cases are not closed on the Ponzi issue.

19 And so we're not seeking to reopen; we're seeking  
20 to continue what was started on the Madoff deposition and by  
21 the Madoff deposition. So, we could say that these  
22 depositions and the documents that are at issue are part of  
23 the very fraud proceeding that this Court has talked about  
24 in arguments, and we've raised in the Roman -- Your Honor  
25 raised in the Roman decision.

1 THE COURT: Let me hear from some of the other  
2 parties.

3 MS. CHAITMAN: I just want to say one thing,  
4 Judge. If I came in and I said, "You know, Judge,  
5 discovery's over in my cases but I now think that I really  
6 should be able to take certain discovery..." I wouldn't get  
7 two feet in this court. And that's what the Trustee's  
8 trying to do.

9 Again, if you look at every one of my answers,  
10 you'll see I disputed that there was a Ponzi scheme. This  
11 has been in the case since I filed the answers. Thank you.

12 THE COURT: Ms. Neville?

13 MS. NEVILLE: Good morning. Carole Neville from  
14 Dentons. Your Honor, I have 14 clients on this -- in this  
15 matter now, and the case management order, and all but one  
16 of them said that discovery closed. And I'm finding it kind  
17 of staggering that Ms. Davis now says that after ten years  
18 and a billion dollars, the Trustee has not taken discovery  
19 on the Ponzi issue.

20 We have expert reports in all of our cases. What  
21 was happening then? What were they doing? Right now, what  
22 I hear, if I'm --

23 THE COURT: What was the date of the Dubinsky  
24 Report? Because that was -- 2013?

25 MR. KRATENSTEIN: It was 2013.

1 THE COURT: 2013. So, certainly the issue was up  
2 there then.

3 MS. NEVILLE: So, I'm hearing now that of 153 --  
4 because it's not 106 cases or 105; it's 153 -- there are  
5 seven cases where discovery is open and they want to have a  
6 consolidated order that cuts off discovery from everybody  
7 else? They were obliged to make a motion to show why they  
8 were entitled to discovery.

9 What that order from, I think it was September  
10 2017, says is that discovery is closed except for the right  
11 for the right for the Picower parties, of all people, the  
12 Defendants, and the Trustee and SIPC to take discovery on  
13 the Madoff. And the Court reserved the issues from the June  
14 29th transcript, which I have with me and I read carefully  
15 yesterday. There were two issues that were reserved, and  
16 they both were the issues Ms. Chaitman raised. There was  
17 the production of trading records and the deposition of  
18 traders.

19 So, the discovery obligation is from the Trustee  
20 to us. Why they now want to open up 12 depositions of  
21 Madoff employees to prove the case -- because I think they  
22 realize they haven't proved it after all of these years and  
23 after all of this money.

24 Rule 16 sets out a standard and I don't think  
25 they've met it. They've been not diligent in pursuing their



1 discovery. It's been a really long time. And it is  
2 prejudicial to us. Because what they intend to do is reopen  
3 all the things that we have now -- I've filed voluminous  
4 mediation statements, I've got my case all lined up, and now  
5 they want to reopen discovery. Or if you opt out, they  
6 don't have to give us what they've been committing to give  
7 us for five years.

8 So, I just -- I really -- I'm kind of outraged at  
9 Ms. Davis' position here, that she's reserved --

10 THE COURT: It's Ms. Bell. I knew who she meant.

11 MS. BELL: I did too, Your Honor.

12 MS. NEVILLE: I'm sorry. I called you Tracy the  
13 other day, too.

14 MS. BELL: You did. I should be used to it.

15 MS. NEVILLE: I have a thing about your name. I  
16 just think that at this point, they haven't made the case  
17 for opening discovery --

18 THE COURT: So, you say you have 13 cases? 13  
19 cases where discovery is closed?

20 MS. NEVILLE: Right.

21 THE COURT: Are you ready to try those cases?

22 MS. NEVILLE: We're in mediation in a good number  
23 of them.

24 THE COURT: I assume they all raise the same  
25 issue, right?

1 MS. NEVILLE: No, they're not. There are  
2 subsequent transferees, there's all kinds of issues.

3 THE COURT: But the underlying issue of this Ponzi  
4 scheme issue. It's the same issue --

5 MS. NEVILLE: Yes, that issue is, but there are  
6 lots of other issues and you've heard some of them when we  
7 did the Markin case.

8 THE COURT: I understand. Before I hear from you,  
9 Ms. Bell, let me hear from the other Defendants, to the  
10 extent they want to be heard.

11 MR. KAJON: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. KAJON: Nicholas Kajon from Stevens & Lee, on  
14 behalf of Defendant Legacy Capital. I'm not going to  
15 reiterate arguments that have already been made. I just  
16 want to focus on a few distinct issues that pertain to my  
17 client and maybe just a couple of other -- or some other  
18 Defendants.

19 First, we did not file a Proof of Claim. Second,  
20 we did not participate in the Madoff deposition, so to the  
21 extent that opens the door, and I'm not conceding it does,  
22 but to the extent it does, it doesn't apply to us. Third,  
23 fact discovery ended in our case more than a year ago.  
24 Fourth, expert discovery ended in our case about a year ago,  
25 but for my right to take the deposition of the Trustee's

1 expert, Bruce Dubinsky, based on his August 2013 report.

2 THE COURT: Well, I think everybody wants to do  
3 that. I know, Ms. Chaitman, you reserved that right also?

4 MS. CHAITMAN: Yes, I did.

5 THE COURT: Was that for -- well, in some cases,  
6 discovery was closed in your cases. Did you reserve that  
7 right, or was that right reserved for all of your cases,  
8 even when discovery is closed?

9 MS. CHAITMAN: You entered an order which said  
10 that we -- I was concerned about the expert reports because  
11 we hadn't gotten the document productions, and you entered  
12 an order which said that we would set the date for expert  
13 disclosures after we completed the --

14 THE COURT: Yeah, but, you know, I read that order  
15 and it talked about operative cases and --

16 MS. CHAITMAN: I think those were the ones that  
17 had participated in the Madoff --

18 THE COURT: So, the ones that were still open at  
19 that --

20 MS. CHAITMAN: Yeah.

21 THE COURT: As of July 2016?

22 MS. CHAITMAN: Exactly.

23 THE COURT: Okay.

24 MR. KAJON: So, we're very concerned, Your Honor,  
25 that, you know, we're differently -- a lot of the Defendants

1 are differently situated. You know, we're all differently  
2 situated from each other to at least some extent. We're at  
3 different stages of discovery, etc. Some it's open, some  
4 it's closed; some it's half open, half closed. And the  
5 Trustee is trying to lump us all in the same boat, and we  
6 don't think that's fair.

7 So what I did is I proposed language to the  
8 Trustee to preserve our separate rights, our separate  
9 status. I suggested that the Trustee include in the order  
10 that neither the Trustee nor Legacy may take any further  
11 discovery in that omnibus procedure but for the right of  
12 Legacy to depose the Trustee's expert, Bruce Dubinsky, based  
13 on his expert report dated August 20, 2013. And neither the  
14 Trustee nor Legacy may use any discovery produced during the  
15 omnibus discovery proceeding for any purpose in the Legacy  
16 adversary proceeding, including without limitation to  
17 supplement any expert reports produced in the Legacy  
18 adversary proceeding.

19 That language would preserve our rights. It would  
20 let this procedure go forward for those Defendants who  
21 wanted to participate in it, but leave us where we were,  
22 preserve our rights. The Trustee rejected that language.  
23 The Trustee did not include anything in the order to  
24 preserve our separate status. And for that reason alone the  
25 motion should be denied, at least as to Legacy.

1 Now, if the Trustee wants to make a motion under  
2 Rule 16 to reopen discovery, they have that right. I'm not  
3 taking that right away from them. But they haven't made  
4 that motion. This motion is not a 16B4 motion saying, I  
5 want to reopen discovery for cause, here's my cause.  
6 There's nothing in that motion that demonstrates cause to  
7 reopen discovery for Legacy or any other Defendant for whom  
8 discovery is closed.

9 So, I think, you know, this -- they're putting the  
10 cart before the horse. I think this motion should be  
11 denied. It could be denied without prejudice. They could  
12 make their Rule 16 motion. If it's granted and Your Honor  
13 reopens discovery for everyone for whom it's already closed,  
14 then we can discuss again whether this procedure makes  
15 sense.

16 But right now, this procedure makes no sense where  
17 each case has its own separate record. You know, there's  
18 certain discovery that was taken in my case that clearly  
19 wasn't taken in other people's cases. Everyone's in that  
20 same boat, so to speak, of having a completely different  
21 record.

22 THE COURT: Can I ask you a question? And I don't  
23 have it before me. How did the case management order deal  
24 with expert discovery? Was there a separate deadline that's  
25 run?

1 MR. KAJON: Our deadline ran. But before it ran,  
2 in our case, the Trustee agreed we could depose Dubinsky.  
3 And I asked them a year ago for mutually -- you know, give  
4 me some dates.

5 THE COURT: Well, Dubinsky -- to the extent  
6 Dubinsky's going to be deposed, he'll be deposed once and  
7 whoever is -- you know, if it's limited to people whose  
8 discovery is still open, it'll be one proceeding. He's not  
9 going to come back 50 times.

10 MR. KAJON: We have no problem coordinating with  
11 the other Defendants on one deposition of Dubinsky.

12 THE COURT: Aside from Dubinsky, are there any  
13 other experts that have -- any other Trustee experts that  
14 have to be deposed?

15 MR. RICH: Yes, Your Honor. Robert Rich on behalf  
16 of Edward H. (indiscernible) and other individual  
17 Defendants. We notice that petition (indiscernible)  
18 Greenblatt.

19 THE COURT: On what issue?

20 MR. RICH: He submitted two expert reports in our  
21 case.

22 MS. BELL: It's on the principle balance  
23 calculation, Your Honor.

24 THE COURT: Yeah, but that's -- you know, that  
25 assumes that -- he just did a cash-in, cash-out analysis; he

1 wouldn't know whether there was legitimate trading or not  
2 legitimate trading.

3 MR. RICH: I'm sorry. I thought you were asking  
4 what deposition --

5 THE COURT: Why would you want to take it -- what  
6 I'm asking you is why would you want to take his deposition?  
7 You went through the records. He figured out what cash went  
8 in, what cash went out. I understand there are disputes as  
9 to whether certain transactions actually reflected cash.  
10 But that's all -- you know, that's what he did. Why would  
11 you need his deposition?

12 MR. RICH: We had questions of expert reports.

13 THE COURT: About what, though, that's relevant to  
14 this? If the Trustee's right, that all the transactions  
15 were fictitious, the Second Circuit has already said it's  
16 dollars in and dollars out. If the Trustee is right that  
17 all the transactions are fictitious, then you have his  
18 principal balance calculation of cash-in, cash-out. But he  
19 has -- I don't think anything to testify to about the  
20 correctness of the Trustee's position.

21 MR. RICH: I think if you're talking about this  
22 one issue -- or in our case, they submitted two expert  
23 reports, one talking about transactions in our specific  
24 case. And we have a lot of inter-account transactions and  
25 how he calculated is --

1 THE COURT: All right. Okay, all right. So  
2 there's Greenblatt -- but that's on an individual case by  
3 case basis. All right. So other than Greenblatt and  
4 Dubinsky, are there any experts on the Trustee's side that  
5 people want to depose? Hearing no response, I'll assume...

6 MR. KRATENSTEIN: Your Honor, may we have a  
7 moment, please?

8 THE COURT: Yeah.

9 MR. KRATENSTEIN: There is at least one other  
10 expert, Your Honor. I believe it's Ms. Galura. I think  
11 we're not yet of a view to whether we want to depose her or  
12 not.

13 THE COURT: I don't know if she did a case by case  
14 analysis. I know a supplemental reported listed PW  
15 transactions. But hers was more of a generic type of --

16 MS. NEVILLE: She did submit -- she submitted  
17 reports of individual cases.

18 THE COURT: Yeah, okay. So that's -- I'm not sure  
19 what she would say but those are three. Anybody else?

20 MR. KRATENSTEIN: Well, the Trustee has said --  
21 and maybe Ms. Bell will address this -- that given the  
22 development of the record that they intend to supplement  
23 reports, put in new experts, etc. So I don't know what  
24 their plan is on that.

25 THE COURT: Well, but if discovery is closed in



1 your case, then it's closed. It wouldn't affect your case,  
2 right, unless there's some sort of consolidated procedure?

3 MS. BELL: Expert discovery is still open in a  
4 number of cases, Your Honor, separate from the fact  
5 discovery.

6 THE COURT: How many? I know in Ms. Chaitman's  
7 cases it's still open, right?

8 MS. BELL: And I think Mr. Kratenstein's case, for  
9 example, those two cases expert discovery is open there. I  
10 don't have an exact number. But in those cases certainly to  
11 the extent that the Trustee would -- and I think this  
12 highlights the problem going forward on lack of a full  
13 record. Because the additional information that Mr.  
14 Dubinsky has been reviewing will be part of an expert report  
15 then.

16 THE COURT: So, let me ask you a question.  
17 Because now I realize that the thing I was concerned about  
18 has occurred already. Mr. Madoff, who was deposed, said a  
19 lot of things but there were a lot of Defendants that  
20 couldn't participate in that.

21 MS. BELL: Or chose not to, Your Honor. They had  
22 the opportunity, and I just want to address that.

23 THE COURT: Even when discovery was closed they  
24 had the opportunity?

25 MS. BELL: Well, when the discovery was closed

1 they did not have the opportunity --

2 THE COURT: Okay, so let me just stop you. So,  
3 there are people, there are entities or Defendants who did  
4 not have the right to participate in the Madoff deposition,  
5 right?

6 MS. BELL: Well, Your Honor, from the group of  
7 objecting Defendants, there are about four or five cases  
8 that would fall into that category and they're represented  
9 by Ms. Chaitman and Ms. Neville. So I think that's a  
10 hypothetical concern that the Defendants have raised. I  
11 don't think it's a real issue before the Court.

12 But with respect to Mr. Kajon's point on Legacy,  
13 and I want to address that because that's the sixth case  
14 where discovery is closed in the Trustee's view -- he did  
15 not get to participate in Madoff's deposition. We offered  
16 him the opportunity to participate and he declined.

17 More than that, Your Honor, and I have from a  
18 transcript of June 2017 where Mr. Kajon before this Court  
19 says, "Some new evidence has come to light. Some new  
20 evidence has come to light just this week that raises some  
21 questions in our mind." And that new evidence, he cited to  
22 Mr. Madoff's deposition.

23 And so it is disingenuous then to say that if Mr.  
24 Madoff's deposition goes forward and you choose not to  
25 participate, you can use the information that comes out of

1 that deposition to then challenge the Trustee's expert and  
2 the Trustee --

3 THE COURT: We can argue about whether what Madoff  
4 says is hearsay in a case where somebody hasn't  
5 participated.

6 MS. BELL: And I agree with that, Your Honor, but  
7 I think the point is the issue that Mr. Kajon raised is the  
8 issue of treasuries. That's an omnibus issue. So, again,  
9 in the interest of efficiency, it just doesn't seem to make  
10 sense to proceed with these on a piecemeal basis.

11 THE COURT: Well, maybe -- maybe the underlying  
12 assumption that this can be tried as a consolidated issue is  
13 not right.

14 MS. BELL: And so we've taken that off the table,  
15 Your Honor. And so now we're just dealing with discovery.

16 THE COURT: No, but if it can't be tried as a  
17 consolidated issue, I don't have to necessarily consolidate  
18 discovery. I mean, yes, Dubinsky will be deposed once,  
19 Greenblatt -- Greenblatt and Galura to some extent have  
20 things to say in individual cases.

21 MS. BELL: That's right, Your Honor.

22 THE COURT: And maybe it's a two-day deposition or  
23 two-part deposition. One is the general what she did or  
24 what he did, and then if people want to take the depositions  
25 in individual cases, they can do it. I don't know, you

1 know, really why it's necessary but --

2 MS. BELL: I think that's right, Your Honor.

3 We've had Mr. Dubinsky -- Ms. Galura's deposition taken in  
4 at least one of these cases and we've certainly had Mr.  
5 Greenblatt's deposition as well, I think. And I can't  
6 recall if any of these counsel participated. But to the  
7 extent that the Court would like the Trustee to make a Rule  
8 16 motion, we're prepared to do that. This motion was made  
9 pursuant to, again, the dealings and the understanding when  
10 we review the transcripts in connection with Mr. Madoff's  
11 deposition. And so the Trustee is prepared to make a Rule  
12 16 motion.

13 We've had counsel who refused to agree to extend  
14 discovery that closed in July with the argument that the  
15 omnibus proceeding would deal with many of these issues.  
16 And so --

17 THE COURT: Again, I'm perplexed that the Trustee  
18 wants to take the discovery on something the Trustee should  
19 know and the Defendants are fighting it. As I said, this  
20 seems to be a reversal. Is there any other Defendant that  
21 wants to be heard?

22 MR. RICH: Good morning, Your Honor. Robert Rich,  
23 Hunton Andrews Kurth, on behalf of Edward (indiscernible)  
24 and certain other individual Defendants. I just want to  
25 address quickly and hopefully put to bed the issue of

1 whether, you know -- that it's just our argument that this  
2 has been on the table. It's actually the Trustee's  
3 argument. They've used it over and over.

4 THE COURT: What argument? Which argument?

5 MR. RICH: The argument that this Ponzi -- the  
6 things that they want discovery on, this Ponzi scheme is a  
7 new issue that they should have discovery on. I actually  
8 tried. I asked for discovery on this exact issue a year ago  
9 when I started seeing that, yes, there were securities  
10 traded in our account. And I wanted more information. And  
11 I wanted more information --

12 THE COURT: Okay, but that was what led to Mr.  
13 Madoff's deposition.

14 MR. RICH: No, I'm sorry, Your Honor. This is  
15 after the deposition. This is just last year. After the  
16 deposition was taken, I said, there's a lot of good  
17 information here. I see there's securities -- I now wanted  
18 a little more. And I want to use that same paragraph that  
19 they want to use, that I should be able to move for more  
20 discovery. I want some more trading records. I want some  
21 treasury transactions. This is what Ms. Bell said they're  
22 looking for.

23 This is what they said. They said, well, the  
24 deposition -- this is in their brief -- they said, the  
25 deposition order provision permitting follow-up based on

1 Madoff's deposition should be construed only as permitting  
2 discovery that could not have been pursued without his  
3 discovery. I said, surely the Defendants did not need  
4 Madoff's deposition to justify a request for documents  
5 regarding securities trading. And the court denied my  
6 request.

7 Over and over they said, in the case management  
8 order, fact discovery is done; it doesn't matter what Madoff  
9 said in his deposition, this issue has been in the record.  
10 And on that basis, the Court denied my request. They're  
11 relying on the exact same language and asking for fact  
12 discovery and the exact same things. My Defendants -- I  
13 have two Defendants that have exposure of \$70,000. They  
14 can't go through 12 more depositions because they don't want  
15 to reopen.

16 THE COURT: Well, all right. You have no open  
17 discovery cases? Your cases are closed?

18 MR. RICH: My case is closed. We have one expert  
19 discovery that we noticed but the deadline -- the other  
20 one's closed.

21 THE COURT: Who is that?

22 MR. RICH: That's for Mr. Greenblatt.

23 THE COURT: Okay. But you wouldn't participate in  
24 the Dubinsky deposition. You never noticed it before  
25 discovery was closed, right?

1 MR. RICH: That's right.

2 THE COURT: All right.

3 MS. BELL: But he participated -- the case  
4 participated in Madoff's deposition, Your Honor, and we  
5 allowed a number of cases on day two of the deposition to  
6 come in to the deposition although discovery was closed --  
7 the discovery cutoff had passed in their case.

8 So, again, I think that there is some one-  
9 sidedness here that, you know, we would appreciate if the  
10 Court takes notice of. Because the Trustee has allowed  
11 discovery in cases where it's been closed and we're not,  
12 again, asking for something new; we're asking for a  
13 continuation.

14 THE COURT: But these Defendants don't want more  
15 discovery. I keep coming back to the same issue. They're  
16 ready to try their cases. And if they haven't gotten  
17 records that Ms. Chaitman thinks she needs, well, that's  
18 going to be their problem, not yours.

19 MS. BELL: I think that's right, Your Honor, and  
20 so it's the Trustee's position that if we were to use some  
21 of those witnesses at trial or those documents that we would  
22 like to, we think, go to the issues that Mr. Madoff is  
23 raising, then there can be no objection on the Defendants'  
24 part that the Trustee did not give them access to these  
25 witnesses that we don't have control over, but certainly

1 access to the documents that we'll use in any deposition.

2 MR. RICH: Your Honor, this is a complete 180 from  
3 the exact argument they made a year ago. They realized  
4 their case is weak. They're seeing that, oh, wait, he  
5 traded the securities that my Defendants have on their  
6 statements? We need to get more discovery to refute it. So  
7 all of a sudden they have a new argument. It should be  
8 denied.

9 THE COURT: Okay. Mr. Kirby?

10 MR. KIRBY: Thank you, Your Honor. Richard Kirby  
11 on behalf of one of the only open case I have where  
12 discovery is 100 percent open. We have an open discovery --

13 THE COURT: I'm sorry. It's open in your case?

14 MR. KIRBY: 100 percent open fact discovery case.

15 THE COURT: Which case is that?

16 MR. KIRBY: It's (indiscernible) BM Investments.

17 THE COURT: Okay. And how many cases do you have?

18 MR. KIRBY: All my other cases are in -- have been  
19 decided on summary judgment --

20 THE COURT: Okay, so you've only got one case  
21 left, right?

22 MR. KIRBY: Right, right. Okay. And there's two  
23 issues I'd like to raise. The first issue I think is a  
24 threshold issue, is whether -- if there's going to be such a  
25 proceeding.



1 THE COURT: I agree with you. That's really  
2 what's driving all this.

3 MR. KIRBY: Because if we wait -- our cases, which  
4 were the South Ferry and Lowry cases, were set as selected  
5 and tried as a test case. They're pending before Judge  
6 Engelmayer at this point. He has a hearing scheduled for  
7 August 28th. We can assume that he will decide certainly  
8 before the end of the year. And the case will either be  
9 decided one way or another, and either side's going to take  
10 --

11 THE COURT: But then it's going to go up to the  
12 Second Circuit, so --

13 MR. KIRBY: Right. But by one or other side.

14 THE COURT: Years away from a resolution of this  
15 issue.

16 MR. KIRBY: Certainly probably through the end of  
17 '19 is what I would expect. But the issue -- and so, we  
18 think those threshold issues make all of this question of  
19 how far back you go irrelevant, especially the issue of  
20 whether the statute of repose limits the Trustee's reach  
21 back altogether.

22 And that issue on -- with all due respect, we  
23 disagree, but there are 16 bankruptcy judges who said it's a  
24 statute of repose. So, it's very possible that Judge  
25 Engelmayer's decision could split on the issue. Okay? So,

1 our first request is that this is premature. We should  
2 wait.

3 THE COURT: All right, but I'm --

4 MR. KIRBY: I understand --

5 THE COURT: You know, I just can't hold up all  
6 these cases, particularly for people who haven't made that  
7 argument.

8 MR. KIRBY: Okay. Your Honor, the second issue  
9 relates to the specific issue in the proposed order of the  
10 Trustee. And that particularly -- that proposed order...  
11 Let me just get my copy of the proposed order here.  
12 Particularly, I want to point Your Honor out to Footnote 1  
13 of the proposed order.

14 THE COURT: Footnote 1. Okay.

15 MR. KIRBY: Capitalized terms but not defined  
16 herein shall have the meaning described to them in the  
17 motion. There is throughout this proposed order reference  
18 to what's called a Ponzi scheme issue. But if you go to  
19 Page 2 of the Trustee's original motion --

20 THE COURT: I'm there.

21 MR. KIRBY: -- original motion, they have -- they  
22 define that term, Ponzi scheme. They call it the Ponzi  
23 issue. And they define it in terms of -- at all relevant  
24 times because... And because of the Ponzi scheme, one, in  
25 connection with the transfers of fictitious profits to each

1 Defendant listed during the two years preceding; and, two,  
2 in calculating Defendants' fictitious profits.

3 That's not what -- all this discussion that you've  
4 heard this morning has nothing to do with the question of  
5 how you calculate. The question is when was there -- is the  
6 Trustee able to establish his prima facie case of fraud?  
7 Okay?

8 THE COURT: The rest of it is -- it's basically  
9 saying calculating fictitious profits, did the Trustee  
10 properly determine that the customers shouldn't get credits  
11 for any purchases or sales which appeared on this statement,  
12 which we include purchases and sales in the convertible  
13 arbitrate scenario, or in the treasury scenario, so --

14 MR. KIRBY: I think the question -- our view is  
15 that if there's going to be an order and if there's going to  
16 be an omnibus proceeding, it should be limited to whether --  
17 what the scope of the fraud is. Because that is the  
18 question that the statute provides.

19 THE COURT: What do you mean by the scope of the  
20 fraud? This all came about when there was a dispute as to  
21 when the Ponzi scheme started and, indeed, whether or not  
22 there was a Ponzi scheme or whether there was a hybrid.

23 MR. KIRBY: But the problem is that Ponzi scheme  
24 is not a defined and accepted term. And so I think the  
25 proper way to proceed and particularly not have something

1 incorporated by reference in which there's confusion in the  
2 proposed order, that they should just use the language of  
3 the statute: whether the Trustee is able to establish the  
4 elements of fraud under 548A1A. And that is --

5 THE COURT: The Trustee can make a prima facie  
6 case without any of this discovery. Now --

7 MR. KIRBY: Which is my point and it's been my  
8 point -- why I was prepared to stipulate to the issue in the  
9 other cases. In my view, this is a frolic and detour. But  
10 I can't speak for all the Defendants.

11 THE COURT: Well, you have stipulated to the  
12 existence of a Ponzi scheme, though. And we have people  
13 here who are saying there was no Ponzi scheme, or there was  
14 a hybrid scheme, where he did purchase some securities which  
15 appear in customer statements.

16 In other words, you were willing to stipulate to  
17 what this whole fight is about.

18 MR. KIRBY: Exactly. But what's now being -- and  
19 in my view, that's only half the question. And that's, of  
20 course, what the Court of Appeals will decide or the  
21 Appellate Courts will decide. But in any event, I don't  
22 think that the second issue, how you go about calculating  
23 it, has anything to do with whether there was a fraud or  
24 not. That's a completely separate issue.

25 THE COURT: Well, putting aside what the order

1 says, what's your -- do you pose a consolidated proceeding,  
2 or do you think it's impractical for the reason I've raised?

3 MR. KIRBY: It's ultimately ironic because we  
4 asked years ago to consolidate these issues in the Cohen  
5 case and it was all denied. Now they want to move around  
6 and suggest that these be consolidated. In my view, and I'm  
7 totally opened --

8 THE COURT: In which case?

9 MR. KIRBY: In the Cohen case --

10 THE COURT: You want to intervene to argue that  
11 antecedent indebtedness was a defense. That's not what this  
12 is about.

13 MR. KIRBY: I understand.

14 THE COURT: You're litigating that issue now.

15 MR. KIRBY: I understand. But that is -- to the  
16 extent that there's -- I have no objection with fully open  
17 discovery. I don't want it delayed for ever. But I have no  
18 objection to there being consolidated discovery on the  
19 similar issues in my open case. But the form of what the  
20 issue is and how that's phrased, we have a specific concern.

21 THE COURT: Okay.

22 MS. BELL: Your Honor, just a couple of quick  
23 points. One is the procedural posture of the case is now --  
24 we're driven by a number of different things. And so I  
25 think it's unfair to say that because we didn't consolidate

1 before, we shouldn't consolidate now. It's an opportunity  
2 for us to streamline these issues.

3 I think with respect to the expert deposition, and  
4 the Court had a question about how many expert reports were  
5 still outstanding -- and it depends on how you -- if it's  
6 under the case management order, there's somewhere around,  
7 as of today, 24 of the 105. And I think this is a great  
8 opportunity to correct the numbers with respect to Ms.  
9 Neville's presentation. This argument is about the 105  
10 objecting cases; it's not about all the remaining good faith  
11 Defendants. Because the other 40-plus did not object. And  
12 so the numbers that we're giving to the Court today are  
13 really around that 105.

14 But if expert discovery is open in 24 or so, now,  
15 that doesn't count in Ms. Chaitman's cases where there's an  
16 order on file, where in a number of her cases we have not  
17 served expert reports. And so that -- again, that's an  
18 opportunity for us to streamline these issues. Because to  
19 the extent that the experts are doing additional work, then  
20 whatever report is served will reflect their current -- the  
21 access to documents that they've had and their current  
22 opinions after reviewing those documents.

23 THE COURT: Their opposition implies that if you  
24 served expert reports in cases where discovery is still  
25 open, they're not going to take -- you know, they don't want

1 to take the discovery of that expert.

2 MS. BELL: But that's not how expert discovery  
3 works, Your Honor. That's not Rule 26.

4 THE COURT: But so what? I come back to the same  
5 question. Why is that the Plaintiff's problem? If they  
6 don't want to take discovery of your case, why are you  
7 insisting on reopening discovery?

8 MS. BELL: Because the burden is the Trustee's, as  
9 the Defendants pointed out in their objections, Your Honor.

10 THE COURT: But you can make out your prima facie  
11 case pretty simply where there's allocution -- I understand  
12 his allocution only speaks around 1992. And I've been told,  
13 by the way, countless times that the start date doesn't  
14 matter for a lot of these cases. But his allocution -- you  
15 have his allocution. What else do you need? And you have  
16 the reconstruction of the principal balance calculations by  
17 Mr. Greenblatt. What else do you need?

18 MS. BELL: Absolutely, we agree, Your Honor. And  
19 we have the allocution not just of Mr. Madoff, but of Mr.  
20 Lipkin, Mr. Kugel, Ms. Pitts. We have a number of other  
21 allocutions that would certainly -- and we, the Trustee was  
22 successful in getting summary judgment on a similar issue,  
23 on what we call the Katz (indiscernible) case, where a Ponzi  
24 wasn't stipulated to, and we got fictitious profits there.  
25 And we submitted a mountain of evidence. And then so we

1 agree with the Court that we could sufficiently --

2 THE COURT: I thought that was settled.

3 MS. BELL: It was, after we got summary judgment  
4 on the fictitious profits amount, and then there was still  
5 the amount above the principal. So the Trustee reached a  
6 settlement. But I think, Your Honor, the point is it's not  
7 whether we can -- because we agree that we can sufficiently  
8 prove -- and, you're right, the admissible evidence that we  
9 have carries the day. I think it's proceeding on different  
10 factual records. Because in the cases that are open, we  
11 will produce documents and have depositions of witnesses.  
12 Because Mr. Madoff's testimony, which is demonstrably false  
13 -- I think the Trustee should be allowed -- afforded the  
14 opportunity to go forward with fact witnesses that can  
15 counter. Mr. Madoff mentioned specific names in his  
16 deposition, and it was always contemplated that we would  
17 have the opportunity to do that.

18 I think any decision by the Court on expert  
19 discovery, just so that we're not here on that issue again,  
20 I think at the very least, the orders are clear that as to  
21 the Trustee, those reports and any expert opinions will be  
22 tabled until after Madoff's deposition. And so I would  
23 assume that the Defendants would not have the same arguments  
24 with respect to the expert process as they do on the fact  
25 discovery piece.



1 MS. NEVILLE: Your Honor, I have one point to  
2 make. Carole Neville. When we exchanged discovery  
3 initially, what we got from the Trustee basically was bank  
4 statements and other documents from their records showing  
5 demands for our redemptions, etc., and access to a database.

6 What we have learned in this process is that the  
7 Trustee withheld all the trading records from that database,  
8 or a good number of them. And, believe me, I have searched  
9 them. Really searched them.

10 So, my point about this order is that I don't want  
11 to reopen discovery but I do think that the Trustee has an  
12 obligation to produce what he has been withholding for ten  
13 years. Because the story that he's been telling for ten  
14 years, as I keep on saying, was hatched in the first days of  
15 the cases and supplemented, and supplemented, and  
16 supplemented. And there's another whole story which we have  
17 developed from the records that we have already been given  
18 but there are of them.

19 So, I think that this is all subterfuge so that  
20 the Trustee, who promised even in June that he was going to  
21 produce these things to us or make them available, still  
22 hasn't done it.

23 THE COURT: I'll give you the last word.

24 MS. BELL: So, Your Honor, I still -- just from  
25 what Neville just said, I'm confused about whether

1 Defendants want more documents or they don't.

2 THE COURT: Well, they want the discovery that was  
3 timely requested or they want you to supplement the  
4 discovery that was timely requested.

5 MS. BELL: We're not currently engaged in any  
6 discussions with Ms. Neville about discovery that was  
7 requested, unless it's their position that any request by  
8 Ms. Chaitman extends to all of the Defendants.

9 MR. KRATENSTEIN: If I may, Your Honor, Andrew  
10 Kratenstein for the Sage Defendants. What I just hear Ms.  
11 Bell say a few moments ago was that what they're going to do  
12 if things proceed as they appear they're going to proceed,  
13 is they're going to -- in cases where expert reports have  
14 not been put in at least, put in -- give to us a whole bunch  
15 of new documents and have their experts rely on them.  
16 That's what I understand them to be doing. And --

17 THE COURT: Or there may be supplemental reports.

18 MR. KRATENSTEIN: Or there may be supplemental  
19 reports. And we'll deal with that at some other time. But  
20 if they're going to do that, then they need to produce the  
21 documents to us. So that's what has to happen, right? If  
22 their experts are going to rely on the documents, we have to  
23 see them. Clearly, that has to happen.

24 THE COURT: So, you don't have any objection in  
25 your individual cases to them filing an expert report

1 tomorrow in a case where discovery is closed, and you don't  
2 have a right to depose that expert?

3 MR. KRATENSTEIN: No, no. They can't have it both  
4 ways. They can't have it both ways.

5 THE COURT: So, if information comes up in cases  
6 where discovery is still open, you want to reopen discovery  
7 in your cases?

8 MR. KRATENSTEIN: No, I do not want to reopen  
9 discovery in my cases.

10 THE COURT: All right.

11 MR. KRATENSTEIN: Let me be very clear. I'm going  
12 to just go back. A year ago tomorrow, you noted something  
13 in our cases, which is, by the way, another reason why this  
14 is all different -- which is my clients actually directed  
15 trades, unlike everybody else here. So I have this whole  
16 other argument that nobody has that we have to deal with.  
17 And they've known about that for a long time.

18 So, in my cases, expert discovery is -- fact  
19 discovery is closed, expert discovery is still open.  
20 They're going to put in expert reports. I don't know what  
21 they're going to say. Okay, yeah, I've seen Dubinsky's old  
22 report -- I don't know what they're going to do next.

23 But if what they're going to do is, now all of a  
24 sudden through the proverbial backdoor after fact discovery  
25 is over, produce a whole bunch of stuff that we've never

1 seen, I mean, I think that that's unfair. I don't want to  
2 take more in fact discovery.

3 THE COURT: But isn't that possibly inevitable if  
4 you have some cases where discovery is still open and the  
5 Trustee can still put in, let's say, expert reports or even  
6 factual discovery --

7 MR. KRATENSTEIN: The factual records -- my view -  
8 -

9 THE COURT: Which you may never requested but you  
10 think is relevant to your case.

11 MR. KRATENSTEIN: Well, we all have requested it.  
12 But the factual information that the experts rely on should  
13 be the factual record in that particular case.

14 THE COURT: Well, they do have to make the  
15 information available to you if they're going to -- without  
16 regard to discovery, by the way, if they're going to use the  
17 expert's report in your case.

18 MR. KRATENSTEIN: Clearly. And we can have that  
19 debate. What should happen here, in my view, is that fact  
20 discovery in the cases where it's closed is closed, and for  
21 all the experts, I agree with you completely -- there should  
22 be one Dubinsky deposition. And if there are other expert  
23 depositions over multiple cases, there should be one  
24 deposition. But that's what should be coordinated to the  
25 extent there's coordination.

1 THE COURT: All right. And should, for example,  
2 Dubinsky is the example we're using -- should the Dubinsky  
3 deposition proceed immediately even though fact discovery is  
4 still open in some cases?

5 MR. KRATENSTEIN: I don't see -- well, in my case  
6 it can't proceed immediately because they haven't served  
7 Dubinsky's report in my case. So, in my case I can't do  
8 that immediately.

9 MS. BELL: And that's precisely the point, Your  
10 Honor. The Trustee would not need to supplement in cases  
11 where expert report is still open, because the experts will  
12 indicate any documents they've considered in connection with  
13 the opinions that are being rendered in the case. And so I  
14 think the fact that the expert -- there's a reason the  
15 expert date is different than the fact discovery date in  
16 these case management orders.

17 I think to the extent that the Court is concerned  
18 about opening -- reopening discovery, I think I just want to  
19 remind the Court that it's the Trustee's position that the  
20 fraud proceeding is underway and the request for this  
21 additional discovery is part of that fraud proceeding. To  
22 the extent that the Court would like us to make a Rule 16  
23 motion, we're prepared to do that, where we go through the  
24 factors of Rule 16. And we can do that on a case by case  
25 basis to the extent we see fit. And that's something we'll

1 evaluate.

2 THE COURT: All right. Look, I'm not going to  
3 grant this motion on the state of this record. The order on  
4 which this is all predicated -- there are actually two of  
5 them, but the first Madoff deposition order said -- in  
6 Paragraph 11 -- it says, "As to the participating customers  
7 whose fact discovery is set to close on or after the date,  
8 the Court extends fact discovery for the limited and sole  
9 purpose of taking Madoff's deposition."

10 It then says, "Other than for that purpose, the  
11 deadlines in the applicable case management orders remain  
12 unchanged, notwithstanding the dates set forth in the case  
13 management orders. Counsel for the Trustee, the  
14 participating customers, the Picower parties, and SIPC have  
15 the right to move the Court for further discovery based upon  
16 Madoff's testimony."

17 If you're going to make that motion, you have to  
18 show specifically what it is Madoff said that's new, that  
19 you couldn't have anticipated with due diligence of taking  
20 that discovery. I'm being told -- and part of the problem  
21 of this process is people tell me a lot of stuff, and it's  
22 not contained in a pleading. But I'm told that some of  
23 these issues were always issues in the case and at some  
24 point, somebody got the idea they wanted to take Madoff's  
25 deposition. I don't even know how that -- I don't recall

1 how that originated. With Ms. Chaitman, all right. And we  
2 limited it to cases where discovery was still open.

3 I'm not inclined to reopen discovery for another  
4 year, certainly in cases where discovery is closed. To the  
5 extent that discovery is still open or you have a duty to  
6 supplement or something like that, your proposed order sort  
7 of wipes all that out and starts everything anew. And  
8 that's not right.

9 Expert discovery we can deal with to the extent  
10 it's still open. People can go in on one day and take  
11 Madoff -- take Dubinsky's deposition. I don't know if you  
12 want to take the deposition Mr. Rich put in. I forget his  
13 name. Friedland?

14 MS. BELL: Mr. Greenblatt.

15 THE COURT: No, no, no. What was your expert's  
16 name? Friedland?

17 MS. BELL: Feingold.

18 THE COURT: All right, Feingold.

19 MR. RICH: Mr. Feingold. But their deadline to  
20 depose in my cases expired.

21 THE COURT: Has your deadline to depose Mr.  
22 Dubinsky expired?

23 MR. RICH: Yes.

24 THE COURT: Okay. Well, deadlines have expired,  
25 they've expired absent the modification of the order. But a

1 lot of these expert reports have been out there forever and  
2 there were expert discovery deadlines set. But, again, I go  
3 back to the orders which authorize Madoff's deposition,  
4 which is the starting point you have to show in order to  
5 reopen discovery in any case that he said something that  
6 would be cause to reopen the case.

7 I am also having second thoughts about a  
8 consolidated proceeding, although I agree with you, it is  
9 certainly the most efficient way to deal with the issue.  
10 There may be practical problems with it. Depositions that  
11 have been taken, for example, I use the Madoff deposition,  
12 and you're going to tell me you invited people and I don't  
13 know what effect that has. But the Madoff deposition,  
14 whether it can be used in all cases, particularly those  
15 cases where discovery was run and people didn't have the  
16 right under the order to participate in it. There may be  
17 other discovery which was taken in an individual case. I  
18 don't know what that might be but -- I'm told Ms. Galura was  
19 deposed. Or Mr. Greenblatt was deposed a couple of times.  
20 I don't know what he or she said, but I don't know if you  
21 can use that in the other cases.

22 So there may be a practical problem, which is  
23 really, as I said, what's driving this notion of reopening  
24 discovery and having a consolidated discovery proceeding.  
25 Because if we can't have a consolidated proceeding, we don't



1 need this consolidated discovery. We'll just do it on a  
2 case by case basis or a group of cases to the extent it  
3 makes sense. So that if Ms. Neville has 13 cases and your  
4 direct case -- to a large extent her defenses are the same  
5 in every one of those cases, yeah, we can try those together  
6 or consolidate those issues.

7 MS. BELL: And the Trustee is prepared to move  
8 forward, Your Honor, on a case by case basis. I just want  
9 to bring the Court back -- I know you said two orders.  
10 There is a third order, Ms. Chaitman's April -- August 10,  
11 2017 order that left all the dates in abeyance with the  
12 exception of the three motions to withdraw the reference  
13 cases. And it expressly outlined the expert report. And so  
14 it's the Trustee's view that whatever decision the Court  
15 renders today, if there can be a carve out for Ms.  
16 Chaitman's cases, because they're to be handled separately  
17 just under this order and it's separate from --

18 THE COURT: She retained the right under that  
19 order -- there was the issue of the subpoenas on the  
20 traders.

21 MS. BELL: Yes, Your Honor.

22 THE COURT: Right. So those were timely served.  
23 And that's just a discovery issue.

24 MS. BELL: But the Trustee has not been serving  
25 expert reports under this order because our reading of the

1 order -- and we've communicated as much to Ms. Chaitman, and  
2 there was no --

3 THE COURT: What other expert? What's the answer?

4 MS. BELL: Well, we haven't served any expert  
5 reports in those cases. And so the Trustee will serve --  
6 we've been holding those dates in abeyance in accordance  
7 with that August order, because in our view, we would  
8 revisit all of this at the end of Madoff's deposition and so  
9 dates would be set at that time, which is now. If we agree  
10 that Madoff's deposition is --

11 THE COURT: Do you want me to just set a schedule  
12 for expert discovery? Or expert depositions?

13 MS. CHAITMAN: Your Honor, I'm going to take up  
14 your offer that I file a Motion to Compel. I haven't  
15 completed --

16 THE COURT: I'm not offering it. I'm just saying  
17 you can always file a Motion to Compel.

18 MS. CHAITMAN: Yes. No, no, no, I understand.

19 THE COURT: I told you the last time, though, and  
20 I'll reiterate so there's no confusion, that if Judge Moss  
21 put a procedure in place to narrow the issues and you're  
22 going around that, you may lose the motion and you may  
23 suffer an award against you of attorneys' fees and costs.  
24 That's what I said the last time. Okay?

25 MS. CHAITMAN: Okay. But the point is fact

1 discovery is open in my cases. So, until we resolve the  
2 issue of the Trustee's production of the documents that have  
3 been withheld, we're not prepared to file expert reports.  
4 We can't possibly.

5 THE COURT: All right. I suppose it's academic if  
6 they make a motion and discovery is reopened in all the  
7 cases. But, you know, I think you have to make a motion and  
8 identify specifically what it is that Madoff said that  
9 triggers the need to reopen discovery in all of the cases.  
10 And I think that motion's going to have to be on limited  
11 issues. I'm not going to reopen discovery generally.  
12 Nothing I've said today has anything to do with outstanding  
13 discovery requests, with the duty to supplement or anything  
14 like that.

15 MS. BELL: Okay, Your Honor, just for  
16 clarification, is the Madoff deposition officially over?  
17 And I --

18 THE COURT: As far as I'm concerned, did everybody  
19 have an opportunity to question him? The fact that they  
20 reserved their rights on the record doesn't mean anything to  
21 me.

22 MS. CHAITMAN: The reason I wanted to take  
23 Madoff's deposition was to question him about the trading  
24 records, and I've gotten maybe one percent of the trading  
25 records. And let me explain to you what the importance is.

1 THE COURT: You can make that motion when the time  
2 comes, but I think you're going to be hard-pressed to  
3 convince me that he should be deposed yet again.

4 MS. CHAITMAN: You know what the problem is,  
5 Judge? What we've been able to establish is we can match  
6 CUSIP numbers on customer statements with CUSIP numbers on  
7 confirmations of the purchase of T-bills with investment  
8 advisory customers' money. We want to be able to do that  
9 with securities. I have been able to do it with some  
10 securities -- when I say securities, I mean, Fortune 100  
11 companies.

12 THE COURT: I have a suggestion that I thought  
13 about. You have how many cases?

14 MS. CHAITMAN: 70 something.

15 THE COURT: Why don't you pick -- see if you can  
16 agree on a sampling and just get -- look for the documents  
17 as to those particular purchases we're talking about, and  
18 see if we can try a sample of your cases.

19 MS. BELL: Your Honor, the issue's a little more  
20 complicated than that because if Ms. Chaitman is matching  
21 CUSIP numbers in one customer statement to what is reflected  
22 on the brokerage account statements, she's matching it for  
23 one account. Madoff used those same CUSIP numbers as  
24 against hundreds of accounts. And so --

25 THE COURT: You know what? You're going to say he

1 never purchased securities. She's going to come forward and  
2 show that the CUSIP number that was purchased, I guess, for  
3 a House 5 account also matches a CUSIP number on a customer  
4 statement or a trading confirmation.

5 MS. CHAITMAN: But when you say a House 5 account,  
6 it was purchased for BLMIS.

7 THE COURT: I understand that. But the whole  
8 point of this is allocation. And what Ms. Bell is saying  
9 is, yeah, that's all well and good but he allocated that  
10 same purchase of one T-bill to 200 accounts. That's  
11 basically what she's saying. But you'll have to show that.

12 MS. BELL: Yes, Your Honor. And we're prepared to  
13 do that.

14 THE COURT: Yeah, you don't need more discovery to  
15 do that, though?

16 MS. BELL: I think we have what we need in the  
17 record to do that, and we have experts who will testify on  
18 that, experts who've been disclosed. I think, Your Honor,  
19 with respect to the -- I think just clarification in terms  
20 of Ms. Chaitman's expert disclosure date, so that when we  
21 leave here today we have a clear sense of how we're  
22 operating.

23 So, again, Ms. Chaitman has said that she needs  
24 more time to review documents before Mr. Madoff's deposition  
25 could be completed. And just to look back, at the time we

1 produced a number of records in connection with the  
2 microfilm dispute that we had last year, and Ms. Chaitman  
3 asked for more time to review those records so she could go  
4 depose Mr. Madoff. She took 25 minutes of his deposition  
5 and then she was done, and then did five minutes of cross.

6 And so I think, you know, to the extent that this  
7 production issue further delays the case, I would request  
8 that the Court limits that.

9 THE COURT: Well, the simple answer to that is  
10 just to schedule Dubinsky's deposition, and in the interim  
11 you can either make your Motion to Compel or you can go back  
12 to Judge Moss, which is what I think you should do since he  
13 put this procedure in place --

14 MS. CHAITMAN: I will go back to Judge Moss --

15 THE COURT: -- and he will --

16 MS. CHAITMAN: If Judge Baker had not agreed to  
17 give me the documents, I would have gone back to Judge Moss  
18 already.

19 MS. BELL: But we have not served Mr. Dubinsky's  
20 deposition yet because fact discovery --

21 THE COURT: Well, why don't you serve it?

22 MS. BELL: We typically have a 60-day period  
23 between -- because we have to have whatever documents are at  
24 play before the expert reports are due. And so there's a  
25 60-day period between the close of fact discovery and expert

1 discovery in every case management order.

2 THE COURT: So what do you do -- you're saying  
3 she's stretching it out, but you're saying you can't serve  
4 your expert report and we can't have expert discovery until  
5 this document dispute is resolved, right?

6 MS. BELL: Until we --

7 THE COURT: So, what do you propose?

8 MS. BELL: Until we determine that fact discovery  
9 is closed. And so I think, Your Honor, that we need to  
10 decide what constitutes the end of fact discovery.

11 THE COURT: Okay, fair enough.

12 MS. BELL: And I don't know what that is today.  
13 And perhaps a further discussion? She also has outstanding  
14 the trader subpoenas, and it's our view that that's part of  
15 fact discovery and the experts should be given an  
16 opportunity --

17 THE COURT: Don't the case management orders in  
18 each case determine when fact discovery is over?

19 MS. BELL: But those dates have expired, I think,  
20 as we just agreed, and Ms. Chaitman has outstanding trader  
21 subpoenas, for example. She wants to take depositions.

22 THE COURT: Okay.

23 MS. BELL: The experts would need to get the  
24 benefit of that -- those depositions before we have to  
25 render an expert report. And so fact discovery -- expert

1 discovery is after the close of fact discovery typically.

2 THE COURT: And you oppose her taking those  
3 depositions if, for no other reason, you want a consolidated  
4 proceeding in which everybody attends those depositions?

5 MS. BELL: Well, we thought it would make sense,  
6 Your Honor. For example, she had David Kugel on the list of  
7 27 traders. He has a plea allocution and he testified at  
8 the criminal trial. There are a number of issues that will  
9 go across cases. And so we think it's not efficient to  
10 proceed with those --

11 THE COURT: Why don't you make your motion to  
12 modify the pretrial orders to reopen discovery?

13 MS. BELL: Yes, Your Honor.

14 THE COURT: And do that expeditiously. Now, with  
15 respect -- there's got to be a time limit, though, Ms.  
16 Chaitman, with you doing something about this issue.

17 MS. CHAITMAN: I will make the motion -- Judge, if  
18 Baker had not indicated to me that they would produce all  
19 the trading records without my going back to Judge Moss, I  
20 would have done it already. But I will go back to Judge  
21 Moss, but I'd like to be able to proceed with the subpoenaed  
22 depositions. The traders have both documents and testimony.

23 THE COURT: I think I want to decide the Trustee's  
24 motion first, because everybody's going to want to come to  
25 Kugel's deposition, for example, if I reopen discovery. And



1 everybody may want to question Kugel. I don't know who  
2 else, you know, is involved. Maybe Bongiorno. I don't know  
3 --

4 MS. CHAITMAN: I was not able to serve a subpoena  
5 on Kugel.

6 THE COURT: Pardon?

7 MS. CHAITMAN: I have not served a subpoena on  
8 Kugel.

9 THE COURT: So, how many depositions do you -- how  
10 many subpoenas have you served?

11 MS. CHAITMAN: You know, I don't have that number.  
12 But I think it's -- I mean, I tried to serve 27. Kugel's in  
13 prison, isn't he? I mean, I didn't serve him, so -- but I'd  
14 like to be able to go forward with that discovery. I don't  
15 --

16 THE COURT: But how many -- that's what I'm asking  
17 you. How many are there?

18 MS. CHAITMAN: I think it's 12 that we actually  
19 served. I'd like to go forward with those 12 depositions  
20 and get the documents.

21 THE COURT: There's only two possibilities:  
22 Either I have to hear her motion first or there's going to  
23 be an interim procedure where anybody can opt in, regardless  
24 of whether discovery is closed, if they want to attend those  
25 depositions. But they'll be deemed to have attended them,

1 whether or not they opt in.

2 MS. CHAITMAN: Why don't we have the Trustee make  
3 the motion and then --

4 THE COURT: All right.

5 MS. BELL: So, Your Honor, just a couple of  
6 scheduling things. I'm on vacation for two weeks in August.  
7 And so if we can defer that a little to --

8 THE COURT: Everybody's on vacation in August,  
9 except me but --

10 MS. BELL: But just to address the point of  
11 Kugel's deposition, the Trustee had --

12 THE COURT: You're the only lawyer working on this  
13 case, right?

14 MS. BELL: No, Your Honor, but many --

15 THE COURT: I've seen your -- I've seen your  
16 firm's fee applications.

17 MS. BELL: A number of other --

18 THE COURT: You must have a high billing rate. Go  
19 ahead.

20 MS. BELL: A number of other folks who are on this  
21 proceeding are also on vacation, Your Honor. But just with  
22 respect to Kugel's deposition, I think the Trustee assumed  
23 that Ms. Chaitman had served, and this is the first time  
24 we're hearing that that deposition --

25 THE COURT: Well, he's in jail.

1 MS. BELL: Well, but, Your Honor, I think, though,  
2 the point I'm trying to make is that the Trustee should be  
3 accorded the opportunity, at least in Ms. Chaitman's cases,  
4 to take Mr. Kugel's deposition because --

5 THE COURT: We can argue with that if we get to a  
6 case by case determination, if I deny your motion or I limit  
7 the issues. I mean, I've been hearing about Kugel's  
8 allocution now for four years, so...

9 MS. BELL: Absolutely right, Your Honor. We  
10 thought this would be an appropriate juncture to do that.

11 THE COURT: Okay.

12 MS. BELL: Mr. Shifrin is prepared to address, to  
13 the extent the Court would like to hear, the specific  
14 statements by Ms. Chaitman on trading records and what that  
15 means and the status of that, if the Court is so inclined.

16 THE COURT: I don't want to hear another -- I  
17 don't want to have another discovery conference on this  
18 issue. As I said, I've had multiple discovery conferences  
19 for two years, culminating last year when Ms. Chaitman said  
20 she wanted to make a Motion to Compel. I suggested that the  
21 better procedure might be to go back to Judge Moss, although  
22 I never said you couldn't make a motion to compel, and I  
23 would never say that.

24 And I'm being told that there were communications,  
25 and the Trustee said he would turn over records, and I don't

1 know what's happened, whether those statements were made or  
2 if they were made, whether there was a follow-up to get the  
3 records. I just don't know. I don't know if there's a  
4 question of proportionality, if there's a question of who's  
5 going to bear the cost of all this. I don't even know what  
6 the cost is. For all I know, you can tell someone to come  
7 into the data room and say, "Here, go have a look at 30  
8 million documents. Just be out in an hour." I just don't  
9 know.

10 And if you're going to argue that it's  
11 disproportionate, you're going to have to explain to me  
12 facts which tell me what the cost is and things like that.  
13 Because I still remember I told you to go and look at 20  
14 reels of microfiche. You looked at four.

15 MS. CHAITMAN: You're conflating two issues, Your  
16 Honor, if I may --

17 THE COURT: Okay, but --

18 MS. CHAITMAN: The microfilm, we dropped the  
19 microfilm, as I explained previously.

20 THE COURT: All right, so the microfilm is no  
21 longer at issue?

22 MS. CHAITMAN: I explained that it wasn't  
23 productive for us to go through the microfilm. There were  
24 like, 5,700 microfilms --

25 THE COURT: So, these 30 million documents, can

1       they be searched?

2               MS. CHAITMAN:   Yes.

3               THE COURT:   With search terms?

4               MS. BELL:   And I'll let Mr. Shifrin respond to  
5       that, Your Honor.

6               MR. SHIFRIN:   Good morning, Your Honor.   Max  
7       Shifrin on behalf of the Trustee.   Yes, the documents in the  
8       BLMIS database can be searched.   And we have been searching  
9       them for years.   We have run dozens of search terms for Ms.  
10      Chaitman, both what we've offered and ones that she's  
11      offered, and we've produced those documents to her.   So she  
12      has access to the BLMIS database.   She simply has to give us  
13      purposeful, concrete, specific, reasonable search terms that  
14      aren't bank names like Fidelity that return 3 million hits.  
15      That's not a reasonable search term.   That's --

16              THE COURT:   Why don't you give them the CUSIP  
17      numbers?   See if they pop up.

18              MS. CHAITMAN:   If I were that smart...

19              THE COURT:   I'm sure you'll figure it out, Ms.  
20      Chaitman.

21              MR. SHIFRIN:   Your Honor, just to clarify a couple  
22      of things here.   The BLMIS database contains, literally, all  
23      documents, hardcopy and electronic that were recovered from  
24      all operative floors of the Lipstick Building.

25              THE COURT:   Okay.

1 MR. SHIFRIN: They contain every electronic  
2 document recovered from every hard drive, every floppy disk,  
3 every CD, every loose paper in everyone's office. It  
4 contains the full assortment of what employees at BLMIS kept  
5 in their files and records. It contains, in short,  
6 irrelevant information.

7 So, the notion that she and that any other  
8 Defendant is entitled to 30 million documents irrespective  
9 of relevance, just the wholesale production of these  
10 materials is absurd and it would never be authorized in any  
11 litigation.

12 THE COURT: Mr. Shifrin, there have been disputes  
13 about what's relevant and not relevant in this case.

14 MR. SHIFRIN: That's true.

15 THE COURT: But if it takes two seconds to put a  
16 search in, and you get 10 million hits with the search, and  
17 then the question is who's going to pay for it, that's  
18 something I can deal with. But if it doesn't cost anything  
19 to put the search terms in and come up with those 10 million  
20 hits, what difference does it make?

21 MR. SHIFRIN: Your Honor, we have no objection to  
22 running reasonable search terms and producing those  
23 documents.

24 THE COURT: Well, okay. All right. I don't have  
25 the search terms before me. I don't know if they're

1 reasonable or unreasonable, but if she wants to look at  
2 every single document and it doesn't cost you anything, so  
3 what?

4 MR. SHIFRIN: Well, Your Honor --

5 THE COURT: I'm just asking.

6 MR. SHIFRIN: Yeah, and I think there's an answer  
7 to that. Rule 26 entitles litigants to relevant discovery.  
8 So, the inherent in that request, 30 million documents,  
9 irrespective of any relevance review or responsiveness  
10 review, fundamentally will include a relevant discovery  
11 that's not entitled under federal rules.

12 THE COURT: Okay.

13 MS. CHAITMAN: But it's like I've been getting  
14 Chinese takeout menus. When I ask for -- I name specific  
15 institutions and I get Chinese takeout menus. If they have  
16 the database, Judge, there's no dispute about it, let them  
17 give us access to it. It won't cost them anything.

18 THE COURT: Well, that's the question --

19 MR. SHIFRIN: She's complaining about Chinese  
20 takeout menus. Now she's asking for 30 million more  
21 documents? So, which one is it?

22 MS. CHAITMAN: I want access to the database.

23 THE COURT: Maybe she's hungry. Look, I've said  
24 enough, all right? My own feeling is if she wants to go and  
25 look at 30 million documents and it doesn't cost you

1 anything, let her look at 30 million documents, if that's  
2 what she wants to do. That'll avoid a dispute about  
3 relevance.

4 If she asks you for copies of 30 million  
5 documents, she'll probably have to pay for it. That's a  
6 different issue.

7 MR. SHIFRIN: That's true, Your Honor, but the  
8 technical aspects of creating a database of 30 million  
9 documents that's accessible to people just to walk in and  
10 wander and run search terms is a little bit more complicated  
11 --

12 THE COURT: All right, but I don't know that. You  
13 have to explain that to me. Thank you. Thank you very  
14 much. What I'll do is I'll just adjourn your motion sine  
15 die with the anticipation that you're going to make a motion  
16 under Rule 16.

17 MS. BELL: Great. Thank you, Your Honor.

18 MS. CHAITMAN: Judge, I don't want to beat a dead  
19 horse --

20 THE COURT: But you will.

21 MS. CHAITMAN: Yes. But when you say he has to  
22 explain to you -- you want me to go back to Judge Moss?

23 THE COURT: I think you should go back to Judge  
24 Moss.

25 MS. CHAITMAN: Okay, okay.



1 THE COURT: That's all.

2 MS. CHAITMAN: Okay.

3 THE COURT: And you can explain to him.

4 MS. CHAITMAN: Okay, thank you.

5 THE COURT: All right. Thank you.

6 (Whereupon these proceedings were concluded at

7 11:42 AM)

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I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

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